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No. 88-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,
Petitioners,

v.

PUBLIC CITIZEN, AMERICAN CANCER SOCIETY, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION and AMERICAN PUBLIC HEALTH ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the court of appeals correct in upholding the modification of a blanket pre-trial protective order when the reasons for entering the order no longer applied, inasmuch as the case was concluded, there is no longer "good cause" for secrecy, and the party opposing disclosure never designated any documents as "confidential," as it was required to do under the protective order?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Public Citizen, American Cancer Society, American Heart Association, American Lung Association and American Public Health Association respectfully urge the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

The issue raised by the petition is whether the courts below acted properly in modifying a pre-trial protective order so as to permit disclosure of certain records which petitioners produced in discovery, but which they never claimed were confidential. Petitioners describe that ruling in apocalyptic terms,

ıt they give only a bare-bones account of the reasons why e protective order was entered in the first place and then odified. Because the facts are crucial to an understanding the issue presented, we set them forth in enough detail to ıable the Court to appreciate what is and what is not at stake this case.

A. *Proceedings in the District Court*

This product liability suit was filed against petitioners (col-ctively "Liggett") in 1983 by the wife and daughter of Joseph Palmer, who died of lung cancer in 1980 after having smoked garettes manufactured by Liggett for a number of years. In ıuary 1985, during the initial discovery phase of the case, intiffs noticed the deposition of and issued a deposition sub-ena to Arthur D. Little, Inc. ("Little"), a consultant which rformed research work for Liggett in the 1950s. By agree-ent of the parties, plaintiffs' counsel was allowed to inspect boxes of documents at Little's offices on 30-31 January 85, and he then copied and took with him the equivalent one box of documents for use in the case (Pet. App. A2-A3).

Several days after plaintiffs' attorney was given the box of cuments with no conditions attached, Liggett filed a mo-n for a protective order covering all past and future discovery sponses. The only ground it advanced for blanket secrecy s that plaintiffs' discovery demands were "massive" and t it would be burdensome for Liggett to designate which ecific documents contained confidential information (Pet. p. N1). Despite this statement, the protective order which ggett submitted with its motion required Liggett to designate records that it regarded as "confidential" (Pet. App. M2). er plaintiffs' objections, the district court signed Liggett's posed order on 25 February 1985, and it is that order which derlies this petition (Pet. App. M1-M6).

Several months later, *The Wall Street Journal* filed a motion to gain access to the Little documents, and plaintiffs filed a notice of their intention to provide these materials to the *Journal*, arguing that the records were produced before the order took effect and had not been designated "confidential." Plaintiffs also submitted an affidavit stating that Liggett's counsel told plaintiffs' counsel at the time the Little documents were produced that none of them was confidential. Liggett did not dispute this statement, but responded by filing a motion to compel plaintiffs to keep the Little documents under seal (Pet. App. A3-A4, L1-L4).

The district court ruled in favor of Liggett and against plaintiffs and the *Journal*, explaining: "The dissemination of this material will not aid in the fair trial of this case. The trial is public and the Wall Street Journal is, of course, able to attend the trial (Pet. App L4)." Several days later, the *Journal* sought reconsideration of this ruling, citing an intervening decision in another smoking case where Liggett was a defendant, *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573 (D.N.J. 1986). In *Cipollone* the district court narrowed a magistrate's protective order which was virtually identical to the one entered by the district court here. The principal effect of that modification was to protect only documents which a party had designated as "confidential" and to permit counsel to disclose records that were not so designated. The *Journal*'s request was denied, although the district court said that the unsealing motion should be renewed after the Third Circuit had ruled on the appeal filed by Liggett and the other defendants in *Cipollone* (Pet. App. I5).

In April 1986 Liggett moved to dismiss plaintiffs' state law claims which were based on a "failure to warn" theory, arguing that those claims were pre-empted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41, which

requires that warning labels appear on cigarette packages beginning 1 January 1966. The district court denied the motion, but the First Circuit reversed, holding on 25 August 1987 that the claims were pre-empted. *Palmer v. Liggett Group Inc.*, 825 F.2d 620. Liggett then moved to dismiss the entire case, and the district court granted this motion on 7 October 1987. Plaintiffs did not appeal from that judgment, nor did they ask this Court to review the First Circuit's pre-emption ruling, and the time for filing a certiorari petition expired on 23 November 1987 (Pet. App. A5-A6).

Under the terms of the protective order, all counsel were obliged to return or destroy discovery materials within 45 days after the case ended (Pet. App. M5). On 28 December 1987, before that period had elapsed, respondents filed the motion which gave rise to this petition. Respondents' motion asked the district court to direct that all discovery materials be filed with the clerk and that the blanket seal be modified to permit public access to all documents which did not qualify for withholding on the ground that they were "confidential" under the terms of the protective order (Pet. App. A6, E1-E2). Respondents also sought (and the district court granted) an emergency motion requiring the parties to retain the records intact pending resolution of the unsealing motion (Pet. App. F1-F3).

In support of the motion, respondents argued that there is a presumption of access to these records under the Federal Rules of Civil Procedure, inasmuch as Rule 5(d) requires parties to file discovery materials with the clerk, where they are available for public inspection unless the district court finds that there is "good cause" under Rule 26(c) for sealing them. When, as here, the district court has excused parties from filing discovery materials (as it is empowered to do under Rule 5(d)), respondents argued that the court may (and in this case

should) order the documents filed. Their argument relied heavily on a Second Circuit case which ordered the filing and unsealing of discovery materials in the *Agent Orange* litigation. *In re "Agent Orange" Product Liability Litigation*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied sub nom. Dow Chemical Co. v. Ryan*, 108 S. Ct. 344 (1987)("*Agent Orange*").

Respondents also urged the court to re-examine the protective order and to hold that there was no longer "good cause" for maintaining the seal on non-confidential records. They pointed out that the First Circuit's pre-emption decision (as well as similar rulings in other circuits) had the sweeping effect of immunizing cigarette manufacturers from liability under state tort laws, thus making Congress the sole arbiter of how much information must be provided to consumers on this important public health issue. They noted (as the First Circuit acknowledged in its pre-emption decision, Pet. App. B6 n.6), that Congress had amended the Labeling Act and had changed the content of these warning labels as it received new information on smoking and health. They also asserted that there was an overriding interest in public access to these non-confidential materials so that Congress and the public could have as much information as possible about the health hazards associated with smoking.

Liggett opposed disclosure on a variety of grounds, including the argument made in its petition that non-confidential records which are produced in discovery, but not used in the litigation, should remain forever under seal. Apart from these general claims, the only "good cause" which Liggett cited for continued secrecy was the fact that, notwithstanding the First Circuit's pre-emption ruling, two smoking cases were still pending against Liggett in that district, in addition to other suits pending elsewhere.

The district court heard oral argument on 28 January 1988, at which time plaintiffs' counsel stated that the only discovery which he had obtained from Liggett was the one box of Little documents, which he still had in his possession. He described these records, which Liggett never claimed were "confidential," as memoranda from individuals at Little to representatives of Liggett indicating to them the results of certain research. He added that the records cast light on Liggett's claims that there are no medical data showing a causal connection between cigarette smoking and any kind of physical disease or defect (Pet. App. O6, O17-O18). It is this box of Little documents that is the focus of this petition.[1]

The district judge granted respondents' motion and ordered that the documents be filed with the clerk and unsealed. In weighing the competing arguments for and against disclosure, he noted the public education goals which Congress had in mind when it enacted the Labeling Act and stated that this case involved "a health issue so important that it resulted in a Congressional act which preempted all claims." He further stated that, even if state law claims are pre-empted, that does not mean that "the need for the public to be educated and to know what's going on is lessened. If anything, given the protection of the preemption, there should be no restrictions on this information" (Pet. App. O27). The Court added that Liggett's concern about the effect of disclosures on jury impartiality could be "controlled by other methods and techniques that judges regularly employ to insulate jurors or to select jurors who are free from influence." On balance, he found no "compelling

[1]Apart from the blanket protective order, the district court also issued two separate orders covering certain medical records produced by plaintiffs. In considering respondents' unsealing motion, the district court declined to modify these orders, finding that the personal privacy interests were still paramount (Pet. App. O29-O31). That ruling was never challenged on appeal.

reason'' why the information should remain under seal and granted respondents' motion, which he stayed pending Liggett's appeal (Pet. App. O27-O28).

B. *Proceedings in the Court of Appeals*

On 28 September 1988 the First Circuit unanimously affirmed the order lifting the protective order, although it modified the decree so as to excuse counsel from having to file discovery materials with the clerk. The effect of this decision was to return the matter to where it was before the protective order was entered: Plaintiffs' counsel is allowed (though not compelled) to make the non-confidential documents in his possession available to respondents (or other third parties), and he has stated his willingness to do so (Pet. App. O18).[2]

Although the First Circuit did not believe that it was appropriate to impose a filing requirement on parties after the case was over, it viewed the protective order in a different light. The court noted that the protective order remained in force even after the case was over and had the effect of permanently enjoining plaintiffs' counsel from disseminating the records, which counsel could have done had the order never been entered or if it had only prohibited disclosure of ''confidential'' records. The court reasoned that since the district court may enforce violations of its protective order even after a case is over, that court also has the power ''to modify

[2]Respondents disagree with the portion of the court of appeals' decision which excuses parties from filing discovery materials with the district court. However, in light of plaintiffs' willingness to make the documents available to respondents, this adverse ruling has no practical effect on respondents. If review should be granted, respondents will defend the result achieved below by supporting the lower courts' ruling on modification of the seal, as well as the filing requirement on which the court of appeals disagreed with respondents.

discovery-related protective orders, even after judgment, when circumstances justify," citing a variety of cases where courts have considered — and in proper instances granted — similar post-judgment requests to modify protective orders (Pet. App. A13).

After rejecting procedural objections regarding respondents' intervention (which Liggett does not ask this Court to review), the court turned to the merits of the unsealing motion in light of this Court's opinion in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The court noted that this case differed from *Seattle Times* in that respondents did not rely on common law or First Amendment theories to override a trial court's finding that "good cause" exists for entering a protective order. Instead, respondents relied solely on the Federal Rules of Civil Procedure in urging the district court to reconsider its earlier ruling and to hold that there is no longer "good cause" under Rule 26(c) for keeping non-confidential documents under seal (Pet. App. A24-A25).

The court of appeals then addressed Liggett's claims that lifting the protective order would impermissibly intrude on Liggett's privacy interests and would excessively disrupt and delay the litigation process. The court found that the Federal Rules "themselves seek to accommodate concerns of privacy and litigative efficiency" (Pet. App. A26), adding that "'private litigants have protectible privacy interests in confidential information produced through discovery,' but . . . the means for protecting that privacy interest is Rule 26(c)." *Id.* at A25-A26, quoting *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987), and citing *Agent Orange*, *supra*, 821 F.2d at 145. The court added that if Liggett's interest in shielding non-confidential records were as great as Liggett claimed, the result would be to require district courts to enter protective orders even when the "good cause" standard of Rule 26 is not satisfied.

The court concluded that the protective order had been properly modified in this case. Citing *Seattle Times*, cases from other circuits, and the *Manual for Complex Litigation, Second*, the court noted that control of discovery "is a matter falling peculiarly within the discretion of the trial court" and that while blanket protective orders "may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification" (Pet. App. A28). In this case, the district court stated on several occasions that the protective order was intended to promote a fair trial, during which the sealed information would be made public. Because dismissal of the case on pre-emption grounds eliminated the possibility of a trial, and with it the rationale upon which the protective order rested, the court found it was proper to consider modification of the protective order (Pet. App. A28-A29).

The court of appeals recognized that the mere fact of dismissal does not automatically warrant lifting a seal; there may be cases in which a party has relied upon the entry of a protective order to turn over documents that are either irrelevant or confidential, thus making subsequent modification unfair to that party (Pet. App. A29). The court held that this case did not fall into that category since the documents here were concededly relevant to the merits and since Liggett's counsel never claimed that the records were confidential, as the protective order required. Therefore, the court concluded, "the reasons underlying the initial promulgation of the order in respect to the particular documents no longer exist; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular records public" (Pet. App. A30).

REASONS FOR DENYING THE WRIT

As the foregoing statement makes clear, the courts below simply held that whatever "good cause" existed for a blanket seal during the pretrial phase of the case, those reasons no longer apply. These courts also found that there are countervailing reasons to encourage disclosure of these records which Liggett never claimed were "confidential," as Liggett was required to do under the order which it drafted and persuaded the district court to sign.

Despite the unremarkable and rather fact-bound nature of this ruling, Liggett contends that the decision below has produced the extraordinary result of giving the public access to non-confidential discovery records which were not actually used in the course of deciding a case. This decision is said to warrant review because it allegedly tramples on privacy rights recognized in *Seattle Times*, conflicts with the Federal Rules of Civil Procedure and decisions of other circuits, and has such "far-reaching and dire consequences for the fair and equitable application of discovery rules throughout the country" that an exercise of this Court's supervisory authority is warranted (Pet. at 4). As we now demonstrate, these assertions are either incorrect, overstated, or based on false assumptions; hence, there is no reason for this Court to grant review.

1. Liggett's initial assertion is that the decision below conflicts with *Seattle Times* (Pet. at 10-11). The problem with this claim is that it relies on a selective reading of that case and upon the mistaken premise that *Seattle Times* created a broad right of privacy which bars "[a]ny use of discovery material outside the sole purpose for which it was produced," namely, "prosecuting and defending a federal lawsuit" (Pet. at 11).

In *Seattle Times* a litigant challenged a protective order that was entered upon a showing of good cause under a state court rule which was identical to Rule 26(c). This order was alleged to be an unconstitutional prior restraint, but this Court upheld the order, citing the privacy interests of litigants and the need to move cases to trial. It is this portion of *Seattle Times* that Liggett's petition copiously quotes, without once mentioning the latter portion of that decision, which makes it clear that these concerns do not compel entry of a blanket, permanent protective order and that overly broad protective orders may have to be reconsidered as the case progresses. This contrast is demonstrated by the fact that this Court limited its holding to situations where the protective order is "entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources . . ." 467 U.S. at 20.

Seattle Times thus reenforces the "good cause" standard in Rule 26 as the touchstone for any inquiry into the proper scope of a protective order. Since respondents' only argument is that good cause is lacking in this case, and since all the lower courts did was to agree with that argument, it is apparent that the decision below is fully consistent with *Seattle Times*. Nothing in that opinion suggests that a district court lacks the power to modify a protective order if the good cause which prompted its entry evaporates, especially if there are countervailing reasons which favor lifting the seal.

If anything, *Seattle Times* supports respondents since the Court emphasized that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery" and has "substantial latitude in fashioning protective orders." 467 U.S. at 36 (footnote omitted). Liggett's real complaint is that it disagrees with how the district

urt balanced the competing interests here, but that disagree-
ent provides no basis for granting its petition.

2. Nor do the Federal Rules of Civil Procedure contain any
ohibition on public disclosure of non-confidential discovery
aterials, and thus it is simply wrong for Liggett to suggest
at there is an open question on this point.

Questions about public access to discovery documents were
ly ventilated and resolved when Rule 5(d) was amended in
80. The initial draft of this amendment proposed that par-
s would no longer file discovery materials with the clerk
nless and until they are used in the proceedings." 77 F.R.D.
3, 622 (1978). This "no-filing" proposal was criticized by
e news media, and a middle course was selected in the final
e under which district courts were given the option of ex-
sing parties from filing discovery documents. However, the
visory Committee Note stated that filing should be generally
quired even if "no use is made of the materials after they
e filed," because discovery materials "are sometimes of
erest to those who may have no access to them except by
equirement of filing, such as members of a class, litigants
ilarly situated, or the public generally." 85 F.R.D. 521,
5. *See Agent Orange, supra*, 821 F.2d at 146. *See generally*
Wright & Miller, *Federal Practice and Procedure: Civil 2d:*
1152, at 438-40 (1986).

Thus, it is incorrect for Liggett to suggest that the Federal
es bar access to discovery materials "unless and until they
used at trial." Even when, as here, parties are temporarily
used from filing discovery materials with the clerk, the par-
s are free to disseminate discovery materials to third par-
unless a protective order is entered upon a finding of good
se under Rule 26(c). Nothing in that Rule compels the en-
of a blanket protective order, and Liggett cites no authority

to that effect. Indeed, the district court here would have been well within the bounds of its authority if it had refused to sign the initial protective order and had stated instead that it would bar dissemination of only those documents which a party showed were "confidential" within the meaning of Rule 26(c). That is what the district court did in *Cipollone*, *supra*, and the Third Circuit upheld that ruling. Liggett urged this Court to review that ruling last Term, making essentially the same arguments which it makes here. The Court denied certiorari then, and there is no basis for granting review now. *Cipollone v. Liggett Group Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, 108 S.Ct. 487 (1987).

3. Nor is there any conflict between the circuits on the interpretation of the Federal Rules in this context. For example, the Seventh Circuit enunciated the relevant inquiry under Rule 26(c) in the same general terms used by the First Circuit: "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (1978), *cert. denied*, 440 U.S. 971 (1979). And as previously noted, the Second Circuit recently upheld a similar unsealing motion with respect to the non-confidential discovery materials which were produced in the *Agent Orange* case, taking an approach very similar to that taken here: "if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection . . ." *Agent Orange*, *supra*, 821 F.2d at 145-46. That opinion also made the rather obvious point — which Liggett never addresses — that pretrial protective orders would be entirely unnecessary unless the Rules presumed that parties could disseminate information learned in discovery to third parties. *Id.* at 146. Opinions in other circuits are to the same effect.

E.g., Oklahoma Hospital Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905 (1985); *In re Alexander Grant & Co., supra*, (11th Cir.); *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982). Since the law has developed quite consistently in this area, there is no conflict for this Court to resolve.

4. Finally, Liggett asks the Court to exercise its supervisory authority because of a fear that the ruling below will result in the district courts being "burdened with a substantial increase in discovery disputes and protective order litigation" (Pet. at 14) (initial capitals and italics omitted). Review is not warranted on this basis for essentially two reasons.

First, the previous discussion has shown how the decision below is consistent with *Seattle Times*, the Federal Rules of Civil Procedure, and rulings in other circuits. Accordingly, it cannot be said that this ruling has "so far departed from the accepted and usual course of judicial proceedings" that intervention by this Court is required. S. Ct. R. 17.1(a).

Second, there is a very practical reason why the decision below will not cause an explosion of time-consuming litigation on these issues: District judges have no desire to expend their time or energies refereeing such disputes, and they are unlikely to enter pretrial protective orders which will increase their workload in this manner. The point is illustrated by this case and *Agent Orange*. Although the trial judges in both cases were willing to reconsider the reasons for secrecy once each case was over, both of them steadfastly refused to modify the blanket seal while discovery was still in progress, citing in each instance the desire to move the case to trial.

But even if Liggett's prediction should come true, and the decision below should prompt similar motions in the future, that prospect provides no basis for granting review here. A

district court is not compelled to grant unsealing motions simply because a case is over, and it may conclude in a given case that circumstances have not changed to such an extent that a seal should be lifted. Moreover, both here and in *Agent Orange*, the district courts were persuaded to modify their orders by overriding public policy considerations which are unlikely to be present in many other cases. Since decisions about modifying seals turn on the facts of each case, and since district courts have ample power to protect litigants and themselves from the concerns which Liggett raises, review of this decision should be denied.[3]

Furthermore, we note that this case provides a poor vehicle for exploring these issues because of its unusual factual setting. Although Liggett has strenuously opposed disclosure of the Little documents, it never availed itself of the procedural safeguards in its own protective order by designating these records as confidential. Nor has Liggett indicated exactly how it would be harmed by disclosure. A footnote to the petition cites the risk of pretrial publicity affecting other cases (Pet. at 11 n.5), but that argument fails to acknowledge that under the First Circuit's pre-emption ruling (as well as similar rulings in three other circuits), Liggett is immune from liability under state tort law for any actions taken after 1 January 1966.

Moreover, between the time that the district court granted our motion and the time that the First Circuit issued its opinion, the *Cipollone* case was tried to a verdict in New Jersey.

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[3]Liggett also argues (at 15-16) that even if litigants are allowed to claim that documents stamped "confidential" should remain exempt from a general unsealing order, litigation over this point would be an enormous drain on judicial resources. Since Liggett has never claimed that these documents are confidential, it cannot seek review on this ground, but in any event, the cases it cites do not support its assertion.

The news media described the contents of various Little documents which were introduced in evidence during that trial; respondents noted this fact in their brief to the court of appeals and appended some of the articles which discussed the Little papers to their brief. Liggett never addressed this point or sought to explain why this development did not undermine its claim that disclosure of the records at issue here will be prejudicial. In effect, Liggett's petition assumes that only abstract issues are at stake here, and its failure to ground those issues in the facts of this case eliminates any arguable basis for granting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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